Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-574

* * *

GIBSON DISTRIBUTING COMPANY, INC., ET AL.,

Appellant

V.

DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.,

Appellee

* * *

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF THE MOTION OF APPELLEE TO DISMISS THE APPEAL

* * *

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* * *

The State of Texas, acting by and through its Attorney General and pursuant to paragraph 4 of Rule 42 of the Rules of this Court, files this its brief as *amicus curiae* in support of the motion of Downtown Development Association of El Paso, Inc., to dismiss the appeal.

Although not a party to the dispute out of which this appeal grows, nevertheless, the State of Texas has a direct interest in the continuing efforts of Gibson Distributing Company, Inc., to have the Texas statute declared unconstitutional and unenforceable.

THE ACTION OF THE STATE OF TEXAS IN ADOPTING AND ENFORCING

ARTICLE 9001, V.T.C.S., IS NOT PROHIBITED BY THE SHERMAN ACT, SECTION 1, TITLE 15, U.S.C.

Relying almost exclusively on *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), Gibson argues that because section 4 of article 9001 creates a private right of action, it runs afoul of the Sherman Act. In so arguing, Gibson completely misconceives the holding in *Cantor* which was that the imprimatur of state approval on private action did not convert the private action into state action and, thus, make it exempt from the Sherman Act under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). In *Cantor* the State of Michigan, acting through its Public Service Commission, had approved the tariff of Detroit Edison Company which, it was claimed, violated the Sherman Antitrust Act. This Court, speaking through Mr. Justice Stevens, said that that approval was not the action of the State acting as sovereign, the "threshold inquiry" of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Quite to the contrary, it is clear that article 9001, V.T.C.S., *is* the act of the State of Texas acting as sovereign. That the statute authorizes private action to enforce its provisions does not bring it within the doctrine of *Cantor* or make it any less the act of the State.

ARTICLE 9001, V.T.C.S., DOES NOT VIOLATE GIBSON'S RIGHT TO SUBSTANTIVE DUE PROCESS

In three landmark decisions in 1961, *McGowan v. Maryland*, 366 U.S. 420, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 620, and *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582, this Court surveyed the constitutionality of statutes like article 9001 and held that they passed muster.

Relying on these decisions by this Court, the Texas courts have upheld the constitutionality of article 9001, V.T.C.S., and its predecessor statutes against attacks similar to those now raised by Gibson. *State v. Sundaco, Inc.*, 445 S.W.2d 606 (Tex.Civ.App.--Eastland 1969, error ref'd n.r.e.); *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407 (Tex.Sup. 1969). This Court dismissed the appeals of *Sundaco* and *Spartan's* for want of a substantial federal-question. *Sundaco, Inc. v. Texas*, 397 U.S. 591 (1970); *Spartan's Industries, Inc. v. Texas*, 397 U.S. 590 (1970).

The same questions were raised in *Gibson Products Co., Inc. v. State*, 545 S.W.2d 128 (Tex.Sup. 1977), and were there rejected by the Texas Supreme Court.

Gibson now argues that this wealth of precedent should be rejected because of the appearance on the scene of what Gibson characterizes as "a scholarly book" (Jurisdictional Statement, p. 3) or "a learned and scholarly review of the statute." (Jurisdictional Statement, p. 12). Harper, The Texas Blue Laws (1974), is anything but a learned or scholarly work. The work, by an unknown author, is obviously a slanted, incomplete recounting of what some newspapers said about what some members of the Texas Legislature said their purposes were in enacting the predecessor to article 9001. The book was brought to the attention of the Texas Supreme Court in this case. Chief Justice Greenhill in the court's opinion, said:

> The argument that the "Sunday Closing Statute" was intended to benefit certain merchants over other merchants and restrain trade is not new, either.

(Jurisdictional Statement, p. 16).

And just as the argument was rejected in the earlier cases, it was rejected by the Supreme Court in this case in 1978.

Surely the Supreme Court of Texas is better able to determine the intent of the Texas Legislature, if that is an issue, than is William G. Harper, whoever he may be, or even than this Court.

It is respectfully submitted that, just as the statute in question does not violate the Sherman Antitrust Act, so, too, it does not violate any constitutional requirement of due process or equal protection.

The appeal of Gibson should be dismissed for want of a substantial federal-question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of the State of Texas as *Amicus Curiae* in Support of the Motion of Appellee to Dismiss the Appeal has been placed, postage prepaid, in the United States First Class Mail on this the ____ day of

November, 1978 addressed to the following:

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